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BRIEFS.

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No. 16-399

IN THE

Supreme Court of the United States

ANTHONY W. PERRY,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

The Merit Systems Protection Board (MSPB) is authorized to hear challenges by certain federal employees to certain major adverse employment actions. If such a challenge involves a claim under the federal anti-discrimination laws, it is referred to as a "mixed" case. This case presents the following question:

> Whether an MSPB decision dismissing a mixed case on jurisdictional grounds is subject to judicial review in district court or in the U.S. Court of Appeals for the Federal Circuit.

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INTRODUCTION

This case presents this Court with an opportunity to finish the job it started in *Kloeckner v. Solis*, 133 S. Ct. 596 (2012): to bring coherence and clarity to the statutory regime governing judicial review of federal employees' employment-related disputes. That regime authorizes judicial review of three distinct categories of disputes: (1) disputes arising entirely under the federal civil-service laws, (2) disputes arising entirely under the federal anti-discrimination laws, and (3) "mixed" disputes arising under *both* the federal civil-service laws and the federal anti-discrimination laws. Everyone agrees that the first category of disputes is subject to judicial review in the U.S. Court of Appeals for the Federal Circuit, while the second category of disputes is subject to judicial review in federal district court. The question here, as in *Kloeckner*, is whether the third category of disputes is subject to judicial review in the Federal Circuit or district court.

And here, as in *Kloeckner*, the statute answers that question "in crystalline fashion," 133 S. Ct. at 604: cases involving both civil-service claims and discrimination claims are subject to review in district court to preserve federal employees' statutory "right" to "trial de novo" of their discrimination claims. 5 U.S.C. §§ 7702(a)(1); 7702(e)(3); 7703(b), (c). The Federal Circuit, like other appellate courts, is not in the business of trying discrimination claims de novo, which is why the statutory regime channels both pure discrimination cases and mixed cases to district court. That simple point is the beginning and the end of this case.

Certainly the creation of the Merit Systems Protection Board (MSPB) as part of the Civil Service Reform Act of 1978 (CSRA) did not divest federal employees of their right to try their employment discrimination claims de novo in district court. The MSPB reviews only (1) pure civil-service cases and (2) mixed cases (because of their civil-service component); it never reviews pure discrimination cases. And, if an employee seeks judicial review of an adverse MSPB decision, the CSRA sends the employee to a different court depending on what type of case is involved: challenges to MSPB decisions in pure civil-service cases go to the Federal Circuit, while challenges to MSPB decisions in mixed cases (because of their discrimination component) go to district court.

The lesson of *Kloeckner* is that determining the proper court for review of an MSPB order in a mixed case has nothing to do with whether the MSPB reaches the *merits* of the discrimination claim. Rather, the CSRA distinguishes between "kind[s] of case[s]" (pure civil-service cases vs. mixed cases), "[r]egardless" of the ground on which the MSPB resolves a particular case. 133 S. Ct. at 604. The Government's contrary position in *Kloeckner* failed to garner a single vote.

Nonetheless, "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried," *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment), the Government now seeks to resurrect the grounds-of-MSPB-dismissal theory rejected as "contriv[ed]" in *Kloeckner*. 133

S. Ct. at 604. Except now the Government's theory is even more contrived. According to the Government, when the MSPB disposes of a mixed case on *procedural* grounds, that case is reviewed in district court (per *Kloeckner*). But when the MSPB disposes of such a case on *jurisdictional* grounds, the Government insists that the case must be reviewed in the Federal Circuit. That jurisdiction/procedure distinction has no basis in law or logic, and is unworkable in practice.

Indeed, the Government itself acknowledged in *Kloeckner* that a jurisdiction/procedure distinction "has no basis" in the statute, and would be "difficult and unpredictable" to apply in practice. Br. for Resp. at 25 n.3, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2012 WL 2883261, at *25 n.3; Br. for Resp. in Opp. at 15, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 6281813, at *15 (internal quotation omitted). That is, if anything, an understatement. A distinction that is "hazy at best and incoherent at worst" deprives both courts and federal employees (many, if not most, of whom proceed *pro se*) of the necessary "clear guidance about the proper forum for the employee's claims at the outset of the case," *Elgin v. Department of the Treasury*, 132 S. Ct. 2126, 2135 (2012), subverts the statutory objective of allowing federal employees to try their discrimination claims de novo in district court, and plunges a straightforward statutory scheme into a morass of complexity.

Like *Kloeckner*, this is an easy case. Everyone agrees that petitioner is entitled to challenge the MSPB's dismissal of his case; the only question is where. Because the case involves discrimination

claims subject to trial de novo, the statute channels the case to district court, not the Federal Circuit. Accordingly, this Court should reverse the judgment and allow petitioner to pursue his claims in district court.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at 829 F.3d 760 and reprinted in the Petition Appendix (Pet. App.) at 1-15a. The MSPB's most recent decision is reported at 2014 WL 5358308, and reprinted at Pet. App. 20-31a. The Administrative Judge's most recent decision is unreported, and reprinted at Pet. App. 32-58a. The MSPB's original decision is reported at 2013 WL 9678428, and reprinted at Pet. App. 59-70a. The Administrative Judge's original decision is unreported, and reprinted at Pet. App. 71-80a.

JURISDICTION

The D.C. Circuit entered judgment on July 22, 2016. Pet. App. 1a. Petitioner filed a timely petition for certiorari on September 27, 2016, which this Court granted on January 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are in the Statutory and Regulatory Appendix at the back of this brief.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Anthony W. Perry was hired by the U.S. Census Bureau in Suitland, Maryland, in 1982, and worked for that agency as an Information Technology Specialist for the next thirty years. Pet.

App. 3a. In the mid-2000s, Perry developed osteoarthritis and began to suffer persistent groin, buttock, and hip pain. *Id.* To help Perry manage the pain, his supervisor allowed him to take breaks during normal working hours and to make up missed time or complete outstanding projects after hours. *Id.* Around the same time, Perry filed a series of complaints with the Census Bureau's Equal Employment Opportunity (EEO) office, and later before an Administrative Judge of the Equal Employment Opportunity Commission (EEOC), alleging discrimination based on race and age, and (later) reprisals based on his pending discrimination claims. Those complaints alleged that Perry had been passed over for promotions, denied training, and received unwarranted performance evaluations as a result of discrimination. Joint Appendix (JA) 42-43, 48; Pet. App. 3-4a.

On June 7, 2011, Perry received a Notice of Proposed Removal from a Census Bureau employee who was not his direct supervisor. The Notice proposed to terminate Perry's employment, alleging that he had been absent during regular working hours and thus had been paid for hours he had not worked. Perry responded that there was no basis for the charges, pointing to the informal accommodation that his supervisor had provided and his unblemished disciplinary record.

In August 2011, Perry and the Census Bureau entered into a settlement agreement that required him to serve a suspension for thirty calendar days, retire no later than September 4, 2012, and release his claims. Pet. App. 35-38a; JA 26-34. Shortly thereafter, the Census Bureau issued a formal notice

suspending Perry for 30 days. JA 35-36. Pursuant to the settlement agreement, Perry left the Census Bureau in April 2012. JA 37.

B. Proceedings Below

After Perry served his 30-day suspension and his retirement took effect, he filed a *pro se* appeal with the MSPB. To initiate such a proceeding, the appellant must fill out a series of forms specifying the nature of his claims. Perry checked the boxes for "Involuntary Retirement" and "Suspension for more than 14 days." JA 40. In an attachment, he claimed that he had been improperly suspended and coerced into retirement. He argued that the Census Bureau's proposed removal notice was the product of race, age, and disability discrimination as well as retaliation for his prior discrimination complaints; that the agency could not substantiate the charges against him; and that the agency had misrepresented his appeal rights during the settlement process. As a result, he claimed that the agency had coerced him into signing the August 2011 settlement agreement in which he released his claims. JA 42-43, 45-46, 48; *see generally Garcia v. Department of Homeland Sec.*, 437 F.3d 1322, 1324 (Fed. Cir. 2006) (*en banc*) (a "facially voluntary action by the employee may actually be involuntary" if coerced by the agency); *Conforto v. MSPB*, 713 F.3d 1111, 1120 (Fed. Cir. 2013) ("The employee in such cases may claim that he was forced to resign or retire in part or in whole because of discrimination by the agency ...."); *Schultz v. U.S. Navy*, 810 F.2d 1133, 1136 (Fed. Cir. 1987) (coercion also established by showing "that the agency knew that the reason for the threatened removal could not be substantiated").

An administrative judge (AJ) ordered Perry to show cause why the challenge should not be dismissed for lack of jurisdiction. Pet. App. 81-89a. "Specifically, resignations and retirements are presumed to be voluntary, and voluntary actions are not appealable to the Board," Pet. App. 82a, and "the Board cannot review the same claims over which you entered into a settlement agreement with the agency," Pet. App. 86a. Perry responded that the settlement agreement had been coerced, and that his release of his claims therein was thus involuntary. He submitted almost two hundred pages of evidence to support his claims. The Census Bureau responded by submitting its own evidence and argument for why the settlement agreement was valid, and Perry thereby had voluntarily released his claims.

After reviewing the evidence but without holding a hearing, the AJ dismissed the appeal for lack of jurisdiction. Pet. App. 71-80a. In particular, the AJ decided that both the 30-day suspension and retirement were voluntary because they resulted from a valid settlement agreement. Pet. App. 74-76a. Perry petitioned the Board for review of the AJ's decision.

As relevant here, the Board granted the petition, and remanded the case to the AJ for further proceedings. Pet. App. 59-70a. The Board concluded that Perry had "made a nonfrivolous allegation of involuntariness sufficient to warrant a jurisdictional hearing," Pet. App. 66a, and that the AJ had thus erred by dismissing the case without holding such a hearing, Pet. App. 67-70a.

On remand, the AJ held a hearing and concluded that Perry "failed to prove that he was coerced or

detrimentally relied on misinformation when he agreed to settle his appeals." Pet. App. 33a. Accordingly, the AJ once again dismissed the appeal for lack of jurisdiction. *See id.* And Perry once again petitioned the Board for review.

This time, however, the Board affirmed the AJ. Pet. App. 20-31a. The Board concluded that Perry "failed to establish that he detrimentally relied on misinformation regarding his potential appeal rights when entering into the settlement agreement and, therefore, that we lack jurisdiction over his appeal because [he] validly waived his appeal rights therein." Pet. App. 27a. The Board's decision included a "**NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS**." Pet. App. 30a. That notice stated in pertinent part:

> You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:
>
> United States Court of Appeals
> for the Federal Circuit
> 717 Madison Place, N.W.
> Washington, DC 20439

Id.

Notwithstanding the notice, Perry—still proceeding *pro se*—filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit. That court promptly entered an order directing Perry to "show cause why this petition should not be dismissed for lack of jurisdiction or transferred to the

United States Court of Appeals for the Federal Circuit." Pet. App. 18a. After Perry and the Government both filed briefs on the jurisdictional issue, the D.C. Circuit discharged the show-cause order. Pet. App. 16-17a. The court directed the parties to "address in their briefs (1) whether this court has jurisdiction to hear this case under 5 U.S.C. § 7703(b)(1)(B); and (2) if not, whether this case should be transferred to the Federal Circuit or a district court pursuant to 5 U.S.C. § 7703(b)(1)(A) or (2)," and appointed counsel as *amicus curiae* "to present arguments in favor of petitioner's position." Pet. App. 17a. Judge Henderson dissented from the order, noting that she "would grant [the Government's] request to transfer the case to the Federal Circuit." Pet. App. 16a n.*.

In the subsequent briefing, everyone (including petitioner) agreed that the D.C. Circuit lacked jurisdiction. Pet. App. 5a. Thus, the only question was whether that court should transfer the case to the Federal Circuit or district court. *Id.*; *see generally* 28 U.S.C. § 1631. The D.C. Circuit held, based on pre-*Kloeckner* circuit precedent, that it was constrained to transfer the case to the Federal Circuit. *See* Pet. App. 2-3a (citing *Powell v. Department of Defense*, 158 F.3d 597 (D.C. Cir. 1998)). *Powell* held that all MSPB decisions "based on procedural or threshold matters," even those "related to the merits," are subject to review in the Federal Circuit. *Id.* at 599. *Powell* did not distinguish between jurisdictional and procedural (or other threshold) dispositions. *Powell*, in turn, relied on *Ballentine v. MSPB*, 738 F.2d 1244 (Fed. Cir. 1984), which held that all MSPB decisions in mixed cases are appealable to the Federal Circuit "until the

merits of a 'mixed' discrimination case are reached by the MSPB." *Id.* at 1247 (emphasis in original).

The D.C. Circuit held below that *Powell* was not necessarily incompatible with *Kloeckner* because the MSPB had dismissed the appeal in *Powell* (like the appeal here) on *jurisdictional* grounds, whereas the MSPB had dismissed the appeal in *Kloeckner* on *procedural* grounds. Pet. App. 7-15a. "In short," the court concluded, "we remain bound by *Powell*," and thus transferred this case to the Federal Circuit. Pet. App. 15a.

The Federal Circuit docketed the appeal, but granted Perry's unopposed motion to hold the briefing in abeyance pending the filing and disposition of a petition for certiorari. *See* Order [Dkt. 21], *Perry v. MSPB*, No. 2016-2377 (Fed. Cir. Aug. 31, 2016).

Perry timely petitioned for a writ of certiorari, which this Court granted on January 13, 2017.

SUMMARY OF ARGUMENT

As relevant here, federal employees enjoy two distinct layers of statutory protection related to their employment: (1) protection under the federal civil-service laws, and (2) protection under the federal anti-discrimination laws. There is no conflict between these two layers of protection, and federal employees may pursue claims under either or both without the need to split those claims.

In particular, a federal employee with *both* civil-service *and* discrimination claims can choose between different avenues of relief. After exhausting internal agency procedures, the employee may proceed directly to federal district court. Or the

employee may choose to avail himself of the MSPB, an independent adjudicatory body for federal civil-service claims. If the MSPB fails to afford the employee the relief sought, the employee may then pursue his claims in federal district court *regardless* of whether the MSPB reached the merits of the claims. The point is simple: cases involving discrimination claims *always* go to federal district court, where the employee is entitled to a trial de novo on his discrimination claims. They *never* go to the Federal Circuit, which (like any other appellate court) cannot take new evidence, provide a jury, or otherwise consider the employee's discrimination claim de novo, as is the employee's right.

That is the lesson of this Court's recent decision in *Kloeckner*. The D.C. Circuit, however, attempted to distinguish *Kloeckner* on the ground that the MSPB there dismissed the employee's claims on *procedural* grounds, whereas the MSPB here dismissed the employee's claims on *jurisdictional* grounds. That is a distinction without a difference. Nothing in the statute turns on the grounds on which the MSPB dismisses an employee's case; rather, as noted above, the proper forum for judicial review turns on the nature of the employee's claims.

Indeed, the Government itself acknowledged in *Kloeckner* that the ostensible jurisdiction/procedure distinction "has no basis" in the statute, and would be "difficult and unpredictable" to apply in practice. The Government was right then, and is wrong now. Nothing in the statute purports to establish a jurisdiction/procedure distinction, and such an amorphous distinction would be impossible for federal employees (many, if not most, of whom

proceed *pro se*) to apply in practice. Accordingly, this Court should reverse the judgment.

ARGUMENT

MSPB Decisions Dismissing Mixed Cases On Either Jurisdictional Or Procedural Grounds Are Reviewed In Federal District Court.

A. The Statutory Framework

This case arises at the intersection of the federal civil-service laws and the federal anti-discrimination laws. The Civil Service Reform Act of 1978, 5 U.S.C. § 1101 *et seq.*, created the MSPB and empowered that agency to review certain serious personnel actions against federal employees: "(1) a removal; (2) a suspension for more than 14 days; (3) a reduction in grade; (4) a reduction in pay; and (5) a furlough of 30 days or less," 5 U.S.C. § 7512; *see also id.* §§ 7513(d), 7701(a); 5 C.F.R. § 1201.3 (listing actions subject to MSPB review); *see generally Kloeckner*, 133 S. Ct. at 600-01 & n.1. Appeals from MSPB decisions, in turn, generally go to the Federal Circuit, *see* 5 U.S.C. § 7703(b)(1)(A), which reviews such decisions under the deferential standards applicable to judicial review of agency action, *see id.* § 7703(c). Federal employees subject to a less serious personnel action (*e.g.*, a one-day suspension) generally have no recourse under the civil-service laws beyond their own agency. *See, e.g.*, 5 U.S.C. § 7503.

In addition to their rights under the federal civil-service laws, federal employees also have employment-related rights under the federal anti-discrimination laws. But unlike the civil-service laws, the anti-discrimination laws are *not* limited to

certain serious personnel actions; rather, they broadly apply to "[a]ll personnel actions affecting employees or applicants for employment." 42 U.S.C. § 2000e-16(a) (Title VII); *see also* 29 U.S.C. § 206(d) (Fair Labor Standards Act (FLSA) equal pay provision); *id.* §§ 631(b), 633a(a) (Age Discrimination in Employment Act) (ADEA). Typically, a federal employee must exhaust a discrimination claim through an Equal Employment Opportunity (EEO) office within the employing agency, and may (but need not) appeal an adverse decision to the Equal Employment Opportunity Commission (EEOC). *See, e.g.*, 42 U.S.C. § 2000e-16(c); 29 C.F.R. §§ 1614.101 - 1614.110.

If these avenues do not prove fruitful, the employee may then file a discrimination complaint in federal district court. *See, e.g.*, 42 U.S.C. § 2000e-16(c) (Title VII); 29 U.S.C. § 216(b) (FLSA); *id.* § 633a(c) (ADEA); 29 C.F.R. § 1614.407 (Title VII, ADEA, and Rehabilitation Act). That complaint does not seek review of agency action; rather, it triggers a straightforward discrimination lawsuit in which the factfinder owes no deference to the agency, and (depending on the relief sought) the employee may be entitled to a jury trial. *See, e.g.*, 42 U.S.C. §§ 1981a(a)(1), (c) (plaintiffs entitled to jury trial in certain Title VII cases); *see generally Chandler v. Roudebush*, 425 U.S. 840, 845-46, 849, 864 (1976) (holding that Congress gave federal employees the same rights as private-sector employees to try their discrimination claims in district court).

Needless to say, claims under the civil-service laws and the anti-discrimination laws are not mutually exclusive, and many federal employees

pursue both. That presents a logistical challenge, because (as described above) there are different paths for pursuing civil-service claims and discrimination claims. To prevent the need for claim-splitting, Congress gave federal employees various options for pursuing these "mixed" cases—*i.e.*, those in which "an employee complains of a personnel action serious enough to appeal to the MSPB *and* alleges that the action was based on discrimination." *Kloeckner*, 133 S. Ct. at 601 (emphasis in original); *see also* 5 U.S.C. § 7702(a); 29 C.F.R. § 1614.302(a).

An employee may pursue a mixed case in the first instance in one of two ways: (1) by filing a complaint with the employing agency's EEO office, or (2) by filing an appeal directly with the MSPB. *See* 5 U.S.C. § 7702(a); 5 C.F.R. § 1201.154(a); 29 C.F.R. § 1614.302(b); *see generally Kloeckner*, 133 S. Ct. at 601. The employee, however, may not file in both of these fora at once. *See* 29 C.F.R. § 1614.302(b). If the employee does so, "whichever is filed first shall be considered an election to proceed in that forum." *Id.*

Should the employee choose to file a mixed case complaint with the employing agency in the first instance, and receive an adverse decision, she has yet another choice about where to proceed. "If the agency decides against her, the employee may then either [1] take the matter to the MSPB or [2] bypass further administrative review by suing the agency in district court." *Kloeckner*, 133 S. Ct. at 601 (citing 5 C.F.R. § 1201.154(b); 29 C.F.R. § 1614.302(d)(1)(i)); *see also* 5 U.S.C. § 7702(a)(2); 29 C.F.R. § 1614.310(a).

Alternatively, the employee may choose to pursue a mixed case by "bringing her case directly to the MSPB, forgoing the agency's own system for evaluating discrimination charges." *Kloeckner*, 133 S. Ct. at 601 (citing 5 C.F.R. § 1201.154(a); 29 C.F.R. § 1614.302(b)). "If the MSPB upholds the personnel action (whether in the first instance or after the agency has done so), the employee again has a choice: She may request additional administrative process, this time with the EEOC, or else she may seek judicial review." *Id.* (citing 5 U.S.C. §§ 7702(a)(3), (b); 5 C.F.R. § 1201.161; 29 C.F.R. § 1614.303)); *see also* 5 U.S.C. § 7703(a).

And, *Kloeckner* held, a district court—not the Federal Circuit—is the proper forum for reviewing mixed cases arising from the MSPB, regardless of whether the MSPB reaches the merits of the discrimination claim. *See Kloeckner*, 133 S. Ct. at 604. That result flows from the plain language of "two sections of the CSRA," Section 7703 ("Judicial review of decisions of the Merit Systems Protection Board") and Section 7702 ("Actions involving discrimination"). *Id.* at 603. "Under § 7703(b)(2), 'cases of discrimination subject to [§ 7702]' shall be filed in district court." *Id.* at 604 (brackets in original). And "[u]nder § 7702(a)(1), the 'cases of discrimination subject to [§ 7702]' are mixed cases—those appealable to the MSPB and alleging discrimination." *Id.* (brackets in original). "Ergo, mixed cases shall be filed in district court." *Id.*

In other words, the statutory regime channels all cases alleging discrimination to district court. Some of those are pure discrimination cases, *see, e.g.*, 42 U.S.C. § 2000e-16(a), and some are cases involving

both discrimination and serious civil-service claims, *see, e.g.*, 5 U.S.C. § 7702(a). If the MSPB has jurisdiction (because of the presence of a serious civil-service claim) it is a "[c]ase[] of discrimination subject to the provisions of section 7702," and it goes to district court. *Id.* § 7703(b)(2). If the MSPB lacks jurisdiction over the civil-service component of an ostensibly mixed case, all that means is that the case is actually a pure discrimination case. It still goes to district court. Either way—if there is a civil-service claim within the MSPB's jurisdiction or not—the case goes to district court. The only cases that go to the Federal Circuit are pure civil-service cases with no discrimination component.

That result makes sense. Employees with discrimination claims need not pursue civil-service claims at all, and even if they do, they need not take such claims to the MSPB. Rather, as noted above, an employee with both civil-service and discrimination claims may bypass the MSPB entirely by "suing the agency in district court" after exhausting internal agency procedures. *Kloeckner*, 133 S. Ct. at 601 (citing 5 C.F.R. § 1201.154(b); 29 C.F.R. § 1614.302(d)(1)(i)); *see also* 5 U.S.C. § 7702(a)(2); 29 C.F.R. § 1614.310(a). The entire system is set up, in the words of the statute, to preserve federal employees' "right" to try their discrimination claims "de novo" in district court. 5 U.S.C. § 7702(e)(3); *see also id.* § 7703(c); S. Rep. No. 95-969, at 63, 1978 U.S.C.C.A.N. 2723, 2785 ("District court is a more appropriate place than the Court of Appeals for [mixed cases] since they may involve additional fact-finding."); *Chandler*, 425 U.S. at 845-48. Under no circumstance is an employee's decision to seek MSPB review of a mixed case a waiver of the employee's

right to pursue discrimination claims in federal district court.*

B. A Jurisdiction/Procedure Distinction Has No Basis In Law Or Logic, And Is Unworkable In Practice.

Notwithstanding *Kloeckner*, the D.C. Circuit held below that this case belongs in the Federal Circuit. *See* Pet. App. 5-15a. That result, according to the court, was dictated by pre-*Kloeckner* circuit precedent holding that cases dismissed by the MSPB on jurisdictional grounds are subject to review in the Federal Circuit even where (as here) they involve discrimination claims. *See* Pet. App. 7-8a (citing *Powell*, 158 F.3d at 599-600). *Powell* was not necessarily inconsistent with *Kloeckner*, the court declared, because *Kloeckner* involved a case dismissed by the MSPB on procedural (as opposed to jurisdictional) grounds. *See* Pet. App. 8-14a; *see also Conforto*, 713 F.3d at 1115-21 (similarly distinguishing *Kloeckner*).

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* A district court is perfectly capable not only of trying an employee's discrimination claims, but also of reviewing an employee's civil-service claims under the standards applicable to judicial review of agency action. *See Kloeckner*, 133 S. Ct. at 607 n.4 (citing *Williams v. Department of the Army*, 715 F.2d 1485, 1491 (Fed. Cir. 1983) (*en banc*)); *Butler v. West*, 164 F.3d 634, 639 n.10 (D.C. Cir. 1999). In this sense, there is a notable asymmetry in the relative capabilities of district courts and the Federal Circuit: whereas a district court can try discrimination claims as well as review agency action (subject, on both scores, to review by the regional circuit), the Federal Circuit (like any other appellate court) has no ability to try discrimination claims in the first instance.

The D.C. Circuit thereby erred. The jurisdiction/procedure distinction on which it relied to distinguish *Kloeckner* (1) has no basis in law or logic, and (2) is unworkable in practice. Each of these points is discussed in turn below.

1. A Jurisdiction/Procedure Distinction Has No Basis In Law Or Logic.

The D.C. Circuit purported to distinguish *Kloeckner*, and justify its continued reliance on pre-*Kloeckner* circuit precedent, based on the language of the statute. *See* Pet. App. 11-12a. As the court explained, "an appeal from an MSPB decision generally belongs in the Federal Circuit unless the case appealed from is a mixed case, in which event review lies in the district court." Pet. App. 11a. The court then got to the heart of the matter. According to the D.C. Circuit, a case dismissed by the MSPB on jurisdictional grounds is not a "mixed case" at all—even if it involves both civil-service and discrimination claims—because "[t]he statute describes a mixed case as one in which the employee both alleges discrimination and 'has been affected by an action which [she] *may appeal* to the' MSPB." *Id.* (quoting 5 U.S.C. § 7702(a)(1)(A); emphasis added by D.C. Circuit); *see also Conforto*, 713 F.3d at 1118 (same). In other words, if the MSPB ultimately determines that the employee's civil-service claims are insufficiently serious to warrant MSPB review, then the case is not a "[c]ase[] of discrimination subject to the provisions of section 7702" that is reviewable in district court under Section 7703(b)(2) *even though it includes discrimination claims.*

Based on this statutory language, the D.C. Circuit sought to distinguish a "jurisdictional"

dismissal from the "procedural" dismissal at issue in *Kloeckner*. When the MSPB dismisses a case on jurisdictional grounds, the court held, "the Board necessarily concludes that [the employee] has not 'been affected by an action which [she] may appeal to the' MSPB." Pet. App. 12a (quoting 5 U.S.C. § 7702(a)(1)(A)). When the MSPB dismisses a case on procedural grounds, in contrast, "the case may still be viewed as one in which the employee was 'affected by an action which [she] may appeal to the' MSPB." *Id.* (quoting 5 U.S.C. § 7702(a)(1)(A)). That is because "the *action* affecting the employee is one she can appeal to the Board." Pet. App. 13a (emphasis added by D.C. Circuit). "It may turn out that she brings her appeal in a procedurally deficient fashion—such as by bringing it too late—but the action itself was appealable." *Id.* "In addition, with procedurally defective appeals, unlike jurisdictionally barred appeals, the Board can excuse the procedural error and permit the appeal to go forward." *Id.* (citing *Conforto*, 713 F.3d at 1118 n.1).

But that approach makes this issue far more complicated than necessary. The statute refers to neither jurisdiction nor procedure; rather, it refers only to an employee who "has been affected by an action which [he] may appeal to the [MSPB]." 5 U.S.C. § 7702(a)(1)(A). It does not say that the employee must be affected by an action that he may *successfully* appeal; rather, the appeal may be barred on either procedural or jurisdictional grounds. But the fact that the MSPB may ultimately determine that the appeal is barred on either procedural or jurisdictional grounds does not mean that the employee has not "been affected by an action which [he] may appeal" to the MSPB. *Id.* Were the law

otherwise, *Kloeckner* would be wrongly decided: the employee in that case was not "affected by an action which [she] may appeal" to the MSPB, because her appeal was time-barred. *See* 133 S. Ct. at 602-04.

Indeed, the Government itself made this point in *Kloeckner*. According to the Government, a jurisdiction/procedure distinction "has no basis" in the statute, because the statutory text "applies equally to an appeal, like [the one in *Kloeckner*], that is not timely filed." *Kloeckner* Br. for Resp. at 25 n.3, 2012 WL 2883261, at *25 n.3; *Kloeckner* Br. for Resp. in Opp. at 15-16, 2011 WL 6281813, at *15-16 (internal quotation omitted) (citing *Stahl v. MSPB*, 83 F.3d 409, 412-13 (Fed. Cir. 1996)); *see also Conforto*, 713 F.3d at 1124 (Dyk, J., dissenting). The Government thus relied on an entirely different theory in *Kloeckner*: that "[w]hen the Board disposes of an appeal on grounds that do not touch on discrimination," appeals from MSPB decisions go to the Federal Circuit "regardless of whether the decision rests on jurisdictional or procedural grounds." *Kloeckner* Br. for Resp. at 25 n.3, 2012 WL 2883261, at *25 n.3. After this Court unanimously rejected that theory in *Kloeckner*, that should have been the end of the matter.

Instead, the Government now embraces the very jurisdiction/procedure distinction that it repudiated in *Kloeckner*. But that theory still has "has no basis" in the statute. *Kloeckner* Br. for Resp. at 25 n.3, 2012 WL 2883261, at *25 n.3. Here, Perry was "affected by an action which [he] may appeal to the [MSPB]," 5 U.S.C. § 7702(a)(1)(A), because he challenged the voluntariness of the settlement agreement in which he released claims challenging

his suspension and removal. Indeed, the MSPB exercised jurisdiction over Perry's case not once but twice and rendered two decisions. *See* Pet. App. 59-70a (first decision); Pet. App. 20-31a (second decision). The fact that the MSPB ultimately *rejected* Perry's claim of involuntariness on the merits did not retroactively divest the MSPB of jurisdiction to render that decision. Because the MSPB indisputably had—and exercised—jurisdiction over this case, the suggestion that this is not a case that Perry could "appeal to the [MSPB]," 5 U.S.C. § 7702(a)(1)(A), is just the sort of convoluted reasoning that this Court unanimously rejected in *Kloeckner*. *See* 133 S. Ct. at 604.

In any event, the D.C. Circuit's ostensible textual argument is not compelled by the text and turns the overall statutory scheme on its head. The D.C. Circuit assumed that an employee has not "been affected by an action which [she] may appeal to the' MSPB," Pet. App. 12a (quoting 5 U.S.C. § 7702(a)(1)(A)), if the MSPB ultimately concludes that the employee has not been affected by an action sufficiently serious to trigger MSPB jurisdiction. But that assumption begs the question whether "an action which [the employee] may appeal to the [MSPB]," 5 U.S.C. § 7702(a)(1)(A), refers to (1) a case in which the employee *claims* that he has been subjected to a personnel action sufficiently serious to warrant MSPB review, or (2) a case in which the MSPB ultimately *concludes* that the employee has been subjected to a personnel action sufficiently serious to warrant MSPB review.

Although the D.C. Circuit assumed, without analysis, that the statute refers to the latter of these

options, the former represents the background norm in American law. As this Court has explained, "[n]ormal practice permits a party to establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537 (1995). A federal court thus may exercise jurisdiction based on the allegations of a "well-pleaded complaint." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998).

The same principle governs here: an MSPB appeal that, on its face, claims that (1) an employee "has been affected by an action which [he] may appeal to the [MSPB]," and (2) "a basis for the action was discrimination," 5 U.S.C. § 7702(a)(1)(A), (B), is a "[c]ase[] of discrimination subject to the provisions of section 7702," *id.* § 7703(b)(2), *regardless* of whether the MSPB ultimately accepts or rejects those claims. Indeed, that is precisely how the relevant EEOC regulation defines a "mixed case appeal": "an appeal filed with the MSPB that *alleges* that an appealable agency action was effected, in whole or in part, because of discrimination ...." 29 C.F.R. § 1614.302(a)(2) (emphasis added); *see also Kloeckner*, 133 S. Ct. at 607 ("A federal employee who *claims* that an agency action appealable to the MSPB violates an antidiscrimination statute listed in § 7702(a)(1) should seek judicial review in district court.") (emphasis added); *Conforto*, 713 F.3d at 1126 n.5 (Dyk, J., dissenting). Congress did not need to specify that the statutory requirements for a "mixed case" are satisfied by the employee's allegations, just as Congress did not need to specify that the requirements for federal court jurisdiction are satisfied by a plaintiff's allegations. *See* 28 U.S.C.

§ 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); *id.* § 1332(a)(1) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 ... and is between ... citizens of different States.").

And that point is particularly compelling in the MSPB context, where a dispute over whether an employee "has been affected by an action which [he] may appeal to the [MSPB]," 5 U.S.C. § 7702(a)(1)(A), often overlaps with the merits of the case. *See, e.g.*, *Shoaf v. Department of Agric.*, 260 F.3d 1336, 1341 (Fed. Cir. 2001) ("[W]e have recognized that the MSPB's jurisdiction and the merits of an alleged involuntary separation are inextricably intertwined.") (internal quotation omitted). This case is a perfect example. The MSPB ultimately determined that it lacked jurisdiction over Perry's civil-service claims on the ground that he voluntarily released those claims by entering into a valid settlement with his employing agency. *See* Pet. App. 27a. But the validity of the settlement is at the heart of the dispute on the *merits* with respect to both Perry's civil-service and discrimination claims. *See, e.g.*, *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974) ("In determining the effectiveness of any ... waiver" of discrimination claims in a settlement agreement, "a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing.").

In essence, the MSPB concluded that it lacked jurisdiction because Perry's claims fail on the merits.

But that is the exact opposite of how our legal system generally operates: whether a complainant's allegations succeed or fail on the merits has nothing to do with the adjudicator's jurisdiction over those allegations. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *Bell v. Hood*, 327 U.S. 678, 682 (1946). Ostensible federal questions fail on the merits every day in federal court, but "it is an old, old principle that the plaintiff's loss on the merits does not retroactively divest the court of jurisdiction." *Mid-American Waste Sys., Inc. v. City of Gary, Ind.*, 49 F.3d 286, 292 (7th Cir. 1995) (Easterbrook, J.).

At best, the D.C. Circuit's ruling that this is not a "mixed" case because the MSPB ultimately concluded that it lacked jurisdiction is circular. The MSPB does not have the last word on its own jurisdiction. Rather, its jurisdictional determinations—like any of its other determinations—are subject to judicial review. Such review takes place in the Federal Circuit in pure civil-service cases, but in district court in mixed cases. *See* 5 U.S.C. §§ 7703(b)(1)(A), (b)(2). Where, as here, an employee challenges the MSPB's jurisdictional determination, it makes no sense to give that very determination conclusive weight in deciding where that determination is to be reviewed. Nothing in the CSRA suggests that the MSPB has the power to dictate which court reviews its decisions.

And yet that is the result of the D.C. Circuit's approach, which improperly assumes the correctness of the MSPB's jurisdictional determination when that issue is disputed. If the MSPB's determination that an employee failed to bring "an action which

[he] may appeal to the [MSPB]," 5 U.S.C. § 7702(a)(1)(A), were conclusive, there would be no basis or need for judicial review of that determination at all, even in the Federal Circuit. A conclusive determination that the employee has no right to appeal to the MSPB means that the employee has no right to review under the civil-service laws at all, *either* in the MSPB *or* in the Federal Circuit. Because the path to review in the Federal Circuit runs through the MSPB, it cannot possibly be that a case that has conclusively been determined not to belong in the MSPB nonetheless belongs in the Federal Circuit.

What is more, if the D.C. Circuit were correct that a case dismissed by the MSPB on jurisdictional grounds has conclusively been determined not to be a "mixed case," *see* Pet. App. 11-14a, then it is a pure discrimination case subject to review in district court, not a pure civil-service case subject to review in the Federal Circuit. But it is perverse to conclude that a case that includes both civil-service and discrimination claims belongs in the Federal Circuit *precisely because* the civil-service claims are insufficient to trigger MSPB jurisdiction.

Given that the entire statutory regime is set up to channel cases involving discrimination claims to district court, *see, e.g.*, 5 U.S.C. § 7702(e)(3), it cannot possibly be that cases involving discrimination claims go to the Federal Circuit when the MSPB concludes that there has not been a sufficiently serious action under the *civil-service* laws to trigger its jurisdiction. As long as there is a dispute over whether an employee "has been affected by an action which [he] may appeal to the [MSPB]," 5 U.S.C.

§ 7702(a)(1)(A), the fact that the MSPB resolves that dispute against the employee does not mean that the employee was never entitled to present that dispute to the MSPB in the first place.

Indeed, the statutory scheme as a whole would make no sense if there were no way to determine whether an employee has filed a "[c]ase[] of discrimination subject to the provisions of section 7702," 5 U.S.C. § 7703(b)(2), unless and until the MSPB adjudicated the employee's claims. As an initial matter, an employee need not take such a mixed case to the MSPB at all; rather, as noted above, Section 7702 itself allows him to take such a case directly from the employing agency to district court. *See* 5 U.S.C. § 7702(a)(2); *see also* 29 C.F.R. §§ 1614.302(d)(1)(i), 1614.310(a), (g). Because Section 7702 allows an employee with a mixed case to bypass the MSPB altogether, the existence *vel non* of a "[c]ase[] of discrimination subject to the provisions of section 7702," 5 U.S.C. § 7703(b)(2), cannot possibly turn on anything the MSPB does or does not do. The decision below effectively penalizes employees who choose to pursue mixed cases through the Board rather than proceeding directly to district court.

In addition, an employee needs to know at the outset whether he is pursuing a pure discrimination case or a mixed case because those different types of cases are subject to different deadlines. In a pure discrimination case, the employee generally has 45 days to contact the employing agency's EEO office. *See* 29 C.F.R. § 1614.105(a). But if he intends to pursue a mixed case, then he has only 30 days to file a complaint with the agency or an appeal with the

Board. *See* 5 C.F.R. § 1201.154(a). Under the decision below, an employee has no way to know which deadline applies until after his case has been fully resolved.

Similarly, Section 7702 requires the employing agency or the MSPB to resolve a "mixed" case within 120 days of filing; if the agency or MSPB fails to do so, the employee may then proceed directly to district court. *See* 5 U.S.C. §§ 7702(a)(1), (2); 7702(e)(1), (2); *see also* 29 C.F.R. §§ 1614.310(g), (h). Needless to say, this regime would make no sense if the employee, agency, or Board had no way of knowing whether a case is "subject to the provisions of section 7702," 5 U.S.C. § 7703(b)(2), at the outset, as opposed to at some undefined point down the road.

Finally, the D.C. Circuit's analysis fails on its own terms, at least on the facts of this case. Here, there can be no question that Perry was subjected to a personnel action (a thirty-day suspension) sufficiently serious to trigger the Board's jurisdiction. *See* Pet. App. 21-22a, JA 35-36. Rather, the only dispute is whether Perry released his right to challenge that suspension through his settlement agreement. But that dispute over the validity of the release involves the *merits* of Perry's challenge to his suspension, not the MSPB's jurisdiction. Nothing in the various statutory provisions endowing the MSPB with jurisdiction to review certain kinds of serious personnel actions, *see* 5 U.S.C. §§ 7512, 7513(d), 7701(a), purports to strip the agency of such jurisdiction where the Government defends on the basis of a release.

Indeed, in ordinary civil litigation, the existence of a release is a defense; the absence of a release is

not an element of the claim that must be alleged by the plaintiff in the complaint. *See, e.g.*, *Town of Newton v. Rumery*, 480 U.S. 386, 391 (1987); *United States v. Rogers Cartage Co.*, 794 F.3d 854, 860 (7th Cir. 2015). The same should be true here. Perry released his claims as part of a settlement. If the Government wishes to rely on the release to defeat those claims, it can only be as part of its defense; the validity of the settlement is irrelevant to whether there is jurisdiction over the claims in the first place.

Although the MSPB dismissed this case for lack of jurisdiction after concluding that Perry's settlement agreement with the Census Bureau was voluntary, the voluntariness of Perry's settlement has nothing to do with the Board's jurisdiction over his suspension claims. *See, e.g.*, *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-63 (2010); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 452-56 (2004). At least where, as here, an agency action of sufficient gravity to trigger MSPB jurisdiction is involved, a case challenging such action is one that the employee "may appeal to the [MSPB]," 5 U.S.C. § 7702(a)(1)(A), regardless of whether the MSPB ultimately concludes that the employee voluntarily agreed to release his claims.

2. A Jurisdiction/Procedure Distinction Is Unworkable In Practice.

In addition to lacking any textual basis, and subverting federal employees' statutory right to try their discrimination claims de novo in district court, the jurisdiction/procedure distinction advanced by the D.C. Circuit to distinguish *Kloeckner* is unworkable in practice.

Few issues have greater bedeviled courts over the years than trying to draw a line between "jurisdictional" and "procedural" (or "claim processing") rules. That distinction can have significant implications in some contexts, because jurisdictional issues cannot be forfeited by litigants, but may (and indeed must) be raised and addressed by an Article III court at any stage of the proceedings. *See, e.g.*, *Kontrick*, 540 U.S. at 455-56. "'Jurisdiction,' the Court has aptly observed, 'is a word of many, too many, meanings,'" and "[c]ourts, including this Court, ... have been less than meticulous" in distinguishing between jurisdictional and procedural rules. *Id.* at 454 (quoting *Steel Co.*, 523 U.S. at 90). These concerns led to a line of recent cases in which this Court sought to limit the label "jurisdictional" only to the rules governing an adjudicatory body's "adjudicatory authority," *id.* at 455—typically where Congress specifically labels a particular rule as "jurisdictional," *Arbaugh*, 546 U.S. at 515-16; *see also Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434-36 (2011); *Reed Elsevier*, 559 U.S. at 160-62; *Bowles v. Russell*, 551 U.S. 205, 209-11 (2007); *id.* at 215-20 (dissenting opinion); *Scarborough v. Principi*, 541 U.S. 401, 413 (2004).

Putting aside the fact (addressed in the previous subsection) that there is nothing "jurisdictional" about the Government's defense that an employee voluntarily released a challenge to a 30-day suspension in a settlement agreement, it is highly implausible that Congress meant for the determination of the proper court to review MSPB decisions to turn on the elusive and "confusing" jurisdiction/procedure distinction. *Reed Elsevier*, 559 U.S. at 161. Given that even the most seasoned

judges and lawyers have trouble drawing that distinction, *compare Bowles*, 551 U.S. at 209-11, *with id.* at 215-20 (dissenting opinion), MSPB claimants (many, if not most, of whom proceed *pro se*) cannot realistically be expected to do so, *see, e.g.*, U.S. Merit Systems Protection Board, *Congressional Budget Justification FY 2017* (Feb. 2016), at 14 ("Generally, at least half or more of the appeals filed with the agency are from *pro se* appellants."), available at http://tinyurl.com/zcv6lxj (last visited February 27, 2017). If Congress had wanted to send jurisdictional dismissals to the Federal Circuit and procedural dismissals to district court, "it could have just said so." *Kloeckner*, 133 S. Ct. at 605.

Indeed, the Government itself acknowledged in *Kloeckner* that superimposing a dispositive jurisdiction/procedure distinction over this statutory scheme makes no sense. As the Government put it:

> [A]s a practical matter, it would make little sense for an employee who files an untimely MSPB appeal to obtain de novo review of her discrimination claim in district court, while an employee who timely files her MSPB appeal, but mistakenly believes that her case falls within the MSPB's jurisdiction, proceeds to the Federal Circuit. And because the MSPB may dismiss on timeliness grounds without examining substantive jurisdiction, [the jurisdiction/procedure distinction] could allow employees with jurisdictionally deficient [civil-service] claims nevertheless to proceed to district court by filing an untimely MSPB appeal.

Kloeckner Br. for Resp. in Opp. at 15-16, 2011 WL 6281813, at *15-16. Thus, the Government emphasized in *Kloeckner*, the jurisdiction/procedure distinction not only "has no basis" in the statute, but also would be "difficult and unpredictable" to apply in practice. *Id.* (internal quotation omitted); *see also Kloeckner* Br. for Resp. at 25 n.3, 2012 WL 2883261, at *25 n.3; *Conforto*, 713 F.3d at 1124-25 (Dyk, J., dissenting) (further explaining why "any distinction between 'procedural' and 'jurisdictional' Board decisions would be unworkable in practice"). Nothing in the statute has changed; only the Government's position has.

As this Court has long recognized, "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Id.* The need for easily administrable rules is particularly acute in this context, given that the Federal Government is the Nation's largest employer, and confusion here has the potential to generate a massive volume of satellite litigation.

The relevant statutes provide a bright-line rule, which this Court articulated in *Kloeckner*: "A federal employee who *claims* that an agency action appealable to the MSPB violates an antidiscrimination statute listed in § 7702(a)(1) should seek judicial review in district court," regardless of whether the MSPB reaches the merits of the claims, or instead dismisses on either procedural or jurisdictional grounds. 133 S. Ct. at

607 (emphasis added); *see* 5 U.S.C. §§ 7703(b), (c). Period. There is no need to dissect the MSPB decision, or to engage in a metaphysical analysis of the "amorphous" jurisdiction/procedure distinction. *Elgin*, 132 S. Ct. at 2136.

The point here, as in *Kloeckner*, is plain: the proper forum for judicial review of an MSPB decision turns on "the nature of an employee's claim," not the basis for the MSPB's decision. *Elgin*, 132 S. Ct. at 2134. Cases involving discrimination claims belong in district court, whether an employee has invoked the MSPB review process or not. Because this case indisputably involves discrimination claims, Perry is entitled to proceed in federal district court.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment.

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Respectfully submitted,

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STATUTORY AND REGULATORY APPENDIX

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5 U.S.C. § 7512. Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title,

(E) an action initiated under section 1215 or 7521 of this title, or

(F) a suitability action taken by the Office under regulations prescribed by the Office, subject to the rules prescribed by the President under this title for the administration of the competitive service.

5 U.S.C. § 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

> **(1)** at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;
>
> **(2)** a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;
>
> **(3)** be represented by an attorney or other representative; and
>
> **(4)** a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request

5 U.S.C. § 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

* * *

5 U.S.C. § 7702. Actions involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who—

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by—

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves—

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of—

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

* * *

(e)(1) Notwithstanding any other provision of law, if at any time after—

(A) the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of

this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)).

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section.

* * *

5 U.S.C. § 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1)

(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(B) During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, a petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) shall be filed in the United

States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the

right to have the facts subject to trial de novo by the reviewing court.

* * *

5 C.F.R. § 1201.154. Time for filing appeal.

For purposes of this section, the date an appellant receives the agency's decision is determined according to the standard set forth at 1201.22(b)(3) of this part. Appellants who file appeals raising issues of prohibited discrimination in connection with a matter otherwise appealable to the Board must comply with the following time limits:

> **(a)** Where the appellant has been subject to an action appealable to the Board, he or she may either file a timely complaint of discrimination with the agency or file an appeal with the Board no later than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision on the appealable action, whichever is later.
>
> **(b)** If the appellant has filed a timely formal complaint of discrimination with the agency:
>
> > **(1)** An appeal must be filed within 30 days after the appellant receives the agency resolution or final decision on the discrimination issue; or
> >
> > **(2)** If the agency has not resolved the matter or issued a final decision on the formal complaint within 120 days, the appellant may appeal the matter directly to the Board at any time after the expiration of 120 calendar days. Once the agency resolves the matter or issues a final decision on the formal complaint, an appeal must be filed within 30 days after the appellant receives the agency

resolution or final decision on the discrimination issue.

(c) If the appellant files an appeal prematurely under this subpart, the judge will dismiss the appeal without prejudice to its later refiling under § 1201.22 of this part. If holding the appeal for a short time would allow it to become timely, the judge may hold the appeal rather than dismiss it.

29 C.F.R. § 1614.302. Mixed case complaints.

(a) Definitions—

(1) *Mixed case complaint.* A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, disability, or genetic information related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

(2) *Mixed case appeals.* A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability, age, or genetic information.

(b) *Election.* An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB. The person shall be advised that he or she may not initially file both a mixed case complaint and an appeal on the same matter and that whichever is filed first shall be considered an

election to proceed in that forum. If a person files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of this notice and to file an EEO complaint, subject to § 1614.107. The date on which the person filed his or her appeal with MSPB shall be deemed to be the date of initial contact with the counselor. If a person files a timely appeal with MSPB from the agency's processing of a mixed case complaint and the MSPB dismisses it for jurisdictional reasons, the agency shall reissue a notice under § 1614.108(f) giving the individual the right to elect between a hearing before an administrative judge and an immediate final decision.

(c) *Dismissal.*

(1) An agency may dismiss a mixed case complaint for the reasons contained in, and under the conditions prescribed in, § 1614.107.

(2) An agency decision to dismiss a mixed case complaint on the basis of the complainant's prior election of the MSPB procedures shall be made as follows:

(i) Where neither the agency nor the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, it shall dismiss the mixed case complaint pursuant to § 1614.107(a)(4) and shall advise the complainant that he or she must bring the allegations of discrimination contained in the rejected complaint to the attention of the MSPB,

pursuant to 5 CFR 1201.155. The dismissal of such a complaint shall advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. A dismissal of a mixed case complaint is not appealable to the Commission except where it is alleged that § 1614.107(a)(4) has been applied to a non-mixed case matter.

(ii) Where the agency or the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, the agency shall hold the mixed case complaint in abeyance until the MSPB's administrative judge rules on the jurisdictional issue, notify the complainant that it is doing so, and instruct him or her to bring the allegation of discrimination to the attention of the MSPB. During this period of time, all time limitations for processing or filing under this part will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC. If the MSPB's administrative judge finds that MSPB has jurisdiction over the matter, the agency shall dismiss the mixed case complaint pursuant to § 1614.107(a)(4), and advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. If the MSPB's administrative judge finds that MSPB does not have jurisdiction over the matter, the agency shall recommence processing of the mixed case complaint as a nonmixed case EEO complaint.

(d) *Procedures for agency processing of mixed case complaints.* When a complainant elects to proceed

initially under this part rather than with the MSPB, the procedures set forth in subpart A shall govern the processing of the mixed case complaint with the following exceptions:

(1) At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:

(i) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 CFR 1201.154(b)(2) or may file a civil action as specified at § 1614.310(g), but not both; and (ii) If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the agency's final decision;

(2) Upon completion of the investigation, the notice provided the complainant in accordance with § 1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing; and

(3) At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 30 days of receipt and of the right to file a civil action as provided at § 1614.310(a).

29 C.F.R. § 1614.310. Right to file a civil action.

An individual who has a complaint processed pursuant to 5 CFR part 1201, subpart E or this subpart is authorized by 5 U.S.C. 7702 to file a civil action in an appropriate United States District Court:

(a) Within 30 days of receipt of a final decision issued by an agency on a complaint unless an appeal is filed with the MSPB; or

(b) Within 30 days of receipt of notice of the final decision or action taken by the MSPB if the individual does not file a petition for consideration with the EEOC; or

(c) Within 30 days of receipt of notice that the Commission has determined not to consider the decision of the MSPB; or

(d) Within 30 days of receipt of notice that the Commission concurs with the decision of the MSPB; or

(e) If the Commission issues a decision different from the decision of the MSPB, within 30 days of receipt of notice that the MSPB concurs in and adopts in whole the decision of the Commission; or

(f) If the MSPB does not concur with the decision of the Commission and reaffirms its initial decision or reaffirms its initial decision with a revision, within 30 days of the receipt of notice of the decision of the Special Panel; or

(g) After 120 days from the date of filing a formal complaint if there is no final action or appeal to the MSPB; or

(h) After 120 days from the date of filing an appeal with the MSPB if the MSPB has not yet made a decision; or

(i) After 180 days from the date of filing a petition for consideration with Commission if there is no decision by the Commission, reconsideration decision by the MSPB or decision by the Special Panel.